IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –II

Excise Appeal No.E/52385-52386/2015-EX [DB]

[Arising out of Order-in-Original No.ALW-EXCUS-000-COM-018-14-15 dated 25.03.2015 passed by the Commissioner (Appeals), Central Excise, Jaipur-I]

M/s. Gemscab Industries Limited …Appellant
Shri R.K. Tyagi

Vs.

Commissioner of Central Excise Ltd., Alwar … Respondent

Present for the Appellant : Mr.Amit Jain, Advocate & Mr. Rahul Tangri
Present for the Respondent: Mr.R.K. Maji, D.R.

Coram: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing / Decision : 03/10/2017

FINAL ORDER NO.57027-57028/2017

PER: ASHOK JINDAL

The appellants are in appeal against the impugned order demanding duty on captively manufactured and consumed armoured cable emerges during the course of manufacture of PVC coated armoured cable.

2. The brief facts of the case are that the appellant is manufacturer of instrumental/power cables. This power cables

can be armoured or unarmoured cable depending upon requirements of the customer. The appellant is manufacturing both type of cables. During the course of manufacture of the final product, PVC coated armoured cables, armoured cable emerges. As appellant is clearing the PVC coated armoured cables by availing Notification No. 12/2012 –CE dated 17.03.2012. Therefore, the armoured cable manufactured and captively consumed by the appellant is not eligible for exemption under Notification No. 67/95 dated 19.03.1995. In these set of facts, a show cause notice was issued to the appellant to demand duty by denying benefit of Notification No. 67/95 ibid. The matter was adjudicated and it was held by the ld. Commissioner that as this armoured cable is marketable and as on final product, the appellant is not paying duty, therefore, on the intermediate product they are not entitled for the benefit of Notification No. 67/95 ibid. Hence, is required to pay duty and the duty was demanded alongwith interest and equivalent amount of penalty was also imposed.

3. Aggrieved from the said order, the appellant is before us.

4. The ld. Counsel for the appellant submits that the appellant is clearing their final goods by availing benefit of Notification No.6/2006-CE dated 01.03.2006 and 12/2012-CE dated 17.03.2012. It is his submission that if they are not availing the benefit of exemption Notification then their final goods are dutiable and availing the benefits of Notification

cited herein above, they are clearing the same on payment of duty. As the said goods armoured cables emerges during the course of manufacture of their final goods and consumed, therefore, in terms of Rule 6(6) of Cenvat Credit Rules, 2004, they are entitled for benefit of exemption under Notification No.67/95 dated 19.03.1995. He also relied on the decision of this Tribunal in the case of KEI Industries Ltd. N Hashmi v. CCE - 2016 (12)TMI 532-CESTAT-New Delhi & Paramount Communication Ltd. V. CCE, Alwar – 2017-TIOL-3304-CESTAT-DEL. He also submitted that the armoured cable emerges at intermediate stage is not marketable and the same cannot be marketed as such. He also submitted that although, the ld. Commissioner in the impugned order has held that it is capable of being marketable but no instance has been brought on record, how it is marketable. Therefore, the impugned order is to be set aside.

5. On the other hand, ld. AR disputed the arguments advanced by the ld. Counsel and submits that user test is applied for holding whether the goods in question are marketable or not, if 'Yes' whether the appellant is entitled for benefit of Notification No. 67/1995 ibid or not. Admittedly, as per the user test, these goods can be used as the final goods. Therefore, as per the user test, these goods are marketable as the intermediate product is capable of being used for

transmission of power, the same shall be considered as marketable.

6. Heard the parties and considered the submissions. On going through the facts of the case in hand, the following issue emerges:-

Issue No.1

a) Whether the goods emerges at intermediate stage are marketable or not /and /whether the appellant is entitled for the benefit under Notification No. 67/1995 dated 16.03.1995 in a case where the appellant is availing the benefit of Notification No. 6/2006-CE dated 01.03.2006 and 12/2012-CE dated 17.03.2012 or not.

6.1. We have examined the test of marketability. Although the function of the goods emerges at the intermediate stage and final goods is transmission of electricity, but the goods at intermediate stage, cannot be sold in the market without a protective PVC coating, which is known as outer sheath. Further, at no instance has been brought in our knowledge by both the sides whether, the intermediate product is capable of being sold in the market. We, further, note that admittedly, the intermediate product cannot be used as such, for transmission of electricity. Therefore, the test of marketability of the goods in question fails. In that circumstance, we hold that the intermediate product emerges during the course of manufacturing of their final product is not marketable. Hence, is not excisable. Therefore, the issue No.1 is answered in favour of the appellant.

Issue No.2

b) Whether the appellant is entitled for benefit of Notification No. 67/95 dated 16.03.1995 has been examined by this Tribunal in the case of KEI Industries Ltd. (supra), wherein this Tribunal observed as under:-

> *"8.An identical issue came up before the Tribunal in the case of Thermo Cables Ltd. (supra) wherein this Tribunal observed as under:*
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> > *4. After considering the submissions, we have found great force in the submissions made by the learned counsel. It is not in dispute that the final products were cleared without payment of duty under Notification No. 6/2006-C.E. which, at Sl. No. 91 thereof, prescribed nil rate of duty for all goods (falling under any chapter) supplied against international competitive bidding. This exemption was subject to the condition that the goods were exempted from basic customs duty and additional duty of customs when imported into India. It is not in dispute that the final products cleared by the assessee without payment of duty during the relevant period satisfied this condition. Against this backdrop, one has*

to read the provisions of Rule 6(6)(vii) of the CENVAT Credit Rules, 2004. This sub-rule reads as follows :-

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either

(i)

(ii)

(iii)

(iv)

(v)

(vi)

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India and supplied against International Competitive Bidding in terms of Notification No. 6/2002-Central Excise, dated the 1st March, 2002 or Notification No. 6/2006-Central Excise, dated the 1st March, 2006, as the case may be.

From the above provision, it is clear that the appellant did not have any liability under sub-rule (2) to maintain separate accounts for receipt, *consumption and inventory of inputs meant for use in the manufacture of dutiable final products and inputs meant for use in the manufacture of exempted goods, nor did the assessee have alternative liability under sub-rule (3) to pay an amount equal to 10% of the value of the exempted goods. This is because their final products were cleared against international competitive bidding in terms of Notification No. 6/2006-C.E. ibid.*

5. Against the above backdrop, one has to examine the scope of Notification No. 67/95-C.E., dated 16-3-1995 (as amended) in so far as the present case is concerned. The opening paragraph of this Notification exempts from payment of CE duty any inputs manufactured in a factory and used within the same factory in or in relation to the manufacture of final products. Input must be one of those specified in the first column and the final product must be one of those specified in the second column of the table annexed to the Notification. Admittedly, copper wire is one of the inputs and the power cables manufactured and cleared by the assessee are final products covered by the Notification. However, the Department would like to deny the benefit of this Notification to *copper wire manufactured by the assessee and captively consumed in their factory for the manufacture of insulated (power) cables. According to the Revenue, the assessee's claim is hit by the proviso to the Notification, which reads as under :*

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise or additional duty of excise leviable thereon or are chargeable to nil rate of duty, other than those goods which are cleared,

(i) to a unit in a Free Trade Zone, or

(ii) to a hundred per cent Export Oriented Undertaking, or

(iii) to a unit in an Electronic Hardware Technology Park, or

(iv) to a unit in a Software Technology Park, or

(v) under notification No. 108/95-Central Excise, dated the 28th August, 1995, or

(vi) by a manufacturer of dutiable and exempted final products, after discharging the obligation

prescribed in Rule 6 of the CENVAT Credit Rules, 2001.

6. From the above proviso to Notification No. 67/95-C.E. ibid, it appears that the bar created therein is not applicable to the inputs used in or in relation to the manufacture of exempted final products cleared by a manufacturer of such exempted final products as well as dutiable final products. In other words, where the manufacturer manufactures both dutiable and exempted final products and uses the inputs in question in the manufacture of the exempted final products, he is entitled to the benefit of exemption from payment of duty on such inputs in terms of the opening paragraph of the Notification. This right is not hit by the opening portion of the proviso to the Notification as the manufacturer is squarely covered by the exception carved out of the proviso vide clause (vi) under the proviso. The Department, it appears, would like to drive the assessee out of the purview of this exception on the ground that the latter had not discharged the obligation prescribed in Rule 6 of the CENVAT Credit Rules, 2004. We have already held that the assessee did not have any liability under sub-rules

> *(1) to (4) of Rule 6 inasmuch as these sub-rules were not applicable, by virtue of sub-rule (6), to the assessee who were clearing their exempted final products against international competitive bidding in terms of Notification No. 6/2006-C.E. ibid. In other words, a conjoint reading of sub-rule (6) of Rule 6 of the CENVAT Credit Rules, 2004 and clause (vi) under the proviso to Notification No. 67/95-C.E. ibid would show that the assessees claim for exemption from payment of duty on copper wire under the Notification was not hit by the opening portion of the proviso to the Notification.*
>
> *7. In the result, the assessee was not liable to pay CE duty on copper wire manufactured and captively used in the manufacture of insulated (power) cables in the factory during the material period. The impugned demands and the connected penalties are, therefore, liable to be set aside. It is ordered accordingly."*

9. As facts of the case are not disputed that the appellant is manufacturing final products and clearing the same on payment of duty in the open market and to Mega Power Projects without payment of duty. In that circumstances, the appellant is entitled for benefit of notification No.

67/1995 ibid for intermediate product emerging during the course of manufacture of final product. Therefore, the impugned orders deserve no merits. Hence, the same are set aside."

7. As in the case of KEI Industries Ltd. (supra), this Tribunal has examined the issue and allowed the benefit of Notification No. 67/95 ibid. Therefore, we hold that the appellants are entitled for benefit of Notification No. 67/95 while they are clearing their final goods by availing benefit of Notification No. 6/2006 dated 01.03.2006 and 12/2012 dated 17.03.2012. Accordingly, the issue is answered in favour of the appellant.

8. In these terms, both the issues are answered in favour of the appellant. Therefore, we set aside the impugned order and allow both the appeals with consequential relief.

[Dictated and pronounced in the open Court]

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Anita